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OFFICE OF PETITIONS

In re Application of

Feuer

Application No. 09/479,736

Filed: 7 January, 2000

Attorney Docket No. CDN1-BH43

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ON PETITION

This is a decision on the (renewed) petition filed on 1 September, 2005, to revive the above-identified application under 37 C.F.R. §1.137(a) as having been abandoned due to unavoidable delay.

For the reasons set forth below, the petition under 37 C.F.R. §1.137(a) is **GRANTED**.

BACKGROUND

The record reflects that:

- Petitioner failed to reply timely and properly to the final Office action mailed on 12 February, 2003, with a reply due (absent a request and fee for extension of time) on or before 12 May, 2003;
- as a result, the application was deemed abandoned after midnight 12 May, 2003;
- the Office mailed Notice of Abandonment on 4 December, 2003;
- the original petition (accompanied by a request for continued examination, fee and amendment as the submission under 37 C.F.R. §1.114 as the reply) and accompanying declaration recite Petitioner's extreme and extended illness commencing clearly before

abandonment, however, the dates involved do not address the extended abandonment through 2004 and into 2005, and Petitioner was reminded that this time period also must be addressed, and for that reason the petition was dismissed on 11 August, 2005;

- Petitioner's submission with the instant renewed petition addressed these deficiencies.

NOTES: **Petitioner *once again* is reminded that patent application files, should they proceed to issue, become public record, and Petitioner may wish to redact private health information, financial accounts information and the like before submission and may wish to substitute such redacted materials for documents already submitted and otherwise seek expungement of such private data from Petitioner's application(s).**

Petitioner's Revocation and Power of Attorney hereby is acknowledged and accepted, and that data has been entered into the Office database.

STATUTES, REGULATIONS AND ANALYSIS

Congress has authorized the Commissioner to "revive an application if the delay is shown to the satisfaction of the Commissioner to have been "unavoidable." 35 U.S.C. §133 (1994).¹

The regulations at 37 C.F.R. §1.137(a) and (b) set forth the requirements for a petitioner to revive a previously unavoidably or unintentionally, respectively, abandoned application under this congressional grant of authority.

The language of 35 U.S.C. §133 and 37 C.F.R. §1.137(a) is clear, unambiguous, and without qualification: the delay in tendering the reply to the outstanding Office action, as well as filing the first petition seeking revival, must have been unavoidable for the reply now to be accepted on

¹ 35 U.S.C. §133 provides:

35 U.S.C. §133 Time for prosecuting application.

Upon failure of the applicant to prosecute the application within six months after any action therein, of which notice has been given or mailed to the applicant, or within such shorter time, not less than thirty days, as fixed by the Commissioner in such action, the application shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner that such delay was unavoidable.

petition.² Delays in responding properly raise the question whether delays are unavoidable.³ Where there is a question whether the delay was unavoidable, Petitioners must meet the burden of establishing that the delay was unavoidable within the meaning of 35 U.S.C. §133 and 37 C.F.R. §1.137(a).⁴ And the Petitioner must be diligent in attending to the matter.⁵ Failure to do so does not constitute the care required under Pratt, and so cannot satisfy the test for diligence and due care.

(By contrast, unintentional delays are those that do not satisfy the very strict statutory and regulatory requirements of unavoidable delay, and also, by definition, are not intentional.⁶))

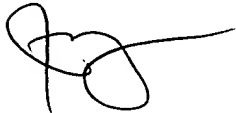
Petitioner has satisfied the regulatory requirements.

CONCLUSION

Accordingly, in view of the record, the petition under 37 C.F.R. §1.137(a) hereby is **granted**.

The instant application is forwarded to Technology Center 2600 for further processing in due course.

Telephone inquiries concerning this decision may be directed to the undersigned at (571) 272-3214.



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Office of Petitions

² Therefore, by example, an unavoidable delay in the payment of the Filing Fee might occur if a reply is shipped by the US Postal Service, but due to catastrophic accident, the delivery is not made.

³ See: Changes to Patent Practice and Procedure; Final Rule Notice, 62 Fed. Reg. at 53158-59 (October 10, 1997), 1203 Off. Gaz. Pat. Office at 86-87 (October 21, 1997).

⁴ See: In re Application of G, 11 USPQ2d 1378, 1380 (Comm'r Pats. 1989).

⁵ See: Diligence in Filing Petitions to Revive and Petitions to Withdraw the Holding of Abandonment, 1124 Off. Gaz. Pat. Office 33 (March 19, 1991). It was and is Petitioner's burden to exercise diligence in seeking either to have the holding of abandonment withdrawn or the application revived. See 1124 Off. Gaz. Pat. Office *supra*.

⁶ Therefore, by example, an unintentional delay in the reply might occur if the reply and transmittal form are to be prepared and/or deposited for shipment by the US Postal Service, but other pressing matters distract one's attention and the mail is not timely prepared and/or deposited for shipment.